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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON MOALEM FOX,

Defendant and Appellant.

A101662

(Alameda County  
Super. Ct. No. H29918)

After finding defendant Jason Moalem Fox had violated his probation, the trial court sentenced him to state prison. Defendant appeals, contending the trial court erred when it denied his motion for substitution of counsel, under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). We affirm.

**I. BACKGROUND**

Defendant pleaded no contest to grand theft on March 29, 2001, based on a charge that he had stolen property from a Fry's Electronics store. (Pen. Code, § 487, subd. (a).) He was sentenced to five years of probation on May 10, 2001. Among the conditions of probation were the requirements that he be of good conduct and obey all laws, and that he stay away from all Fry's Electronics stores.

On October 17, 2002, the Alameda County District Attorney filed a petition to revoke defendant's probation, alleging that on October 5, defendant had committed theft at a Fry's Electronics store. (Pen. Code, §§ 484, subd. (a), 666.) A public defender was appointed for defendant.

On November 25, 2002, defendant moved for substitution of counsel.<sup>1</sup> At the hearing on the motion, defendant stated that he found his appointed counsel, Richard Ortega, abrasive, rude, and impatient, and that the two of them were “biting heads.” According to defendant, during a discussion about a possible settlement, he said something to Ortega about a trial, and Ortega said he would leave a voice mail for the judge saying defendant wanted a trial. Defendant interpreted this as an attempt to browbeat or coerce him into settling. Defendant said he had requested a transcript from a particular hearing, but Ortega did not help him get it, and that Ortega had refused to provide him with an accordion folder to hold his papers. Defendant also complained that on one occasion, Ortega had made clear to him that Ortega was in charge of making a particular decision; however, defendant could not remember the exact context. Throughout this discussion, the trial court asked questions of defendant, and defendant responded to those questions.

The trial court asked Ortega to respond to the points defendant had raised. As to defendant’s claim that he was abrasive and rude, Ortega stated that he always tried to conduct himself in a professional manner, that he and defendant had a disagreement over the likely outcome of the case, and that he felt he had an obligation to be forthright with his clients. Ortega said he may have told defendant he did not have to accept the district attorney’s settlement offer and that he had a right to a trial, but he did not believe he had said that he would leave a voice mail for the judge stating defendant wanted to go to trial, stating, “frankly I just don’t leave messages of that type for judges.” Ortega explained that the transcript defendant wanted was not of the type the public defender’s office normally receives automatically, and that his office did not have the budget to have the transcript prepared. He did not recall having discussed an accordion file with defendant. Ortega also told the court he did not believe he had a personality conflict that would prevent him from working with defendant on the case, and that both he and another

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<sup>1</sup> Defendant had also unsuccessfully made a *Marsden* motion in connection with the separate prosecution of the October 5, 2002, theft.

attorney from his office had held extended telephone conversations with defendant, in which they had discussed his case in detail. In response, defendant pointed out that he had a neurochemical illness that made it difficult for him to process information.

The court denied the motion, noting that Ortega had conducted many conversations with defendant and was apparently willing to continue doing so, and that Ortega was aware of defendant's need for extra attention due to his medical condition. As to defendant's complaint that Ortega was harsh with him, the trial court noted, "the harshness is part of the reality of the situation." The court noted that from a review of the file it appeared Ortega had been handling the defense competently. The court concluded defendant had not shown there had been such a breakdown in the relationship that he was being denied effective assistance of counsel.

Defendant then moved to represent himself, and the trial court granted his motion. On January 15, 2003, after a probation revocation hearing, the trial court found defendant in violation of probation, and sentenced him to prison for the low term of 16 months. This timely appeal followed.

## **II. DISCUSSION**

Defendant contends the trial court should have granted his *Marsden* motion. "The law governing this area is well settled. 'When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].' [Citations.]" (*People v. Fierro* (1991) 1 Cal.4th 173, 204; see also *People v. Webster* (1991) 54 Cal.3d 411, 435 ["[d]enial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would 'substantially impair' the defendant's right to assistance of counsel"].) The fact that the defendant does not like his lawyer, trust him, get along with him, or

think highly of him is not a sufficient basis for substitution of counsel. (*People v. Memro* (1995) 11 Cal.4th 786, 857.) Likewise, the fact that the defendant and his attorney differ on trial tactics is not a basis for substitution. (*People v. Padilla* (1995) 11 Cal.4th 891, 927, overruled in part on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

We review a trial court's ruling denying a *Marsden* motion for abuse of discretion. (*People v. Silva* (2001) 25 Cal.4th 345, 367.) As stated in *People v. Smith* (1993) 6 Cal.4th 684, 696 (*Smith*), "The court should deny a request for new counsel at any stage unless it is satisfied that the defendant has made the required showing. This lies within the exercise of the trial court's discretion, which will not be overturned on appeal absent a clear abuse of that discretion."

Defendant has not shown the trial court abused its discretion in denying his motion for substitution of counsel. As stated in *Smith*, "The court fully allowed defendant to state his complaints, then carefully inquired into them. Defense counsel responded point by point. . . . To the extent there was a credibility question between defendant and counsel at the hearing, the court was 'entitled to accept counsel's explanation.' [Citation.] Although clearly some heated words were spoken between client and attorney . . . , that alone does not require a substitution of counsel absent an irreconcilable conflict. [Citation.]" (*Smith, supra*, 6 Cal.4th at p. 696.) Like the court in *Smith*, we conclude the trial court did not abuse its discretion in concluding no such conflict existed. The court allowed defendant to air his complaints fully, asked questions of defendant, and asked Ortega to respond to each point. The court acknowledged a personality conflict between defendant and Ortega, but concluded there had been no showing that the conflict would prevent Ortega from communicating with defendant or from representing him effectively. This conclusion is supported by Ortega's statements that he had held extensive telephone conversations with defendant, and that he did not believe there was a personality conflict that would prevent him from working on the case. Thus, the trial court did not abuse its discretion in concluding there was no irreconcilable conflict that would prevent Ortega from representing defendant effectively.

Defendant contends, however, that the trial court did not inquire adequately into the effect of his mental condition on Ortega's representation. Defendant indicated his illness made it difficult for him to remember and process information. Ortega stated he had held repeated conversations with defendant about his case, and the trial court acknowledged this, stating Ortega appeared willing to continue to hold such conversations. The court also pointed out that the conversations defendant was complaining about had taken place during a period when he had not been taking his medications. Thus, this is not a case like *In re Miller* (1973) 33 Cal.App.3d 1005, 1021-1023, cited by defendant, in which the trial court failed to inquire into the reasons the defendant was concerned that his counsel had not obtained his health records; there, the omission deprived the defendant of his only possible defense, that of diminished capacity. Nor is this a case such as *People v. Cruz* (1978) 83 Cal.App.3d 308, 315-317, in which the trial court failed to ask either the defendant or the public defender the basis of the defendant's dissatisfaction. In this case, the trial court sufficiently inquired into and considered defendant's special needs related to his mental condition.

### **III. DISPOSITION**

The judgment is affirmed.

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RIVERA, J.

We concur:

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KAY, P.J.

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REARDON, J.